United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1350

To be argued by MERVYN HAMBURG

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

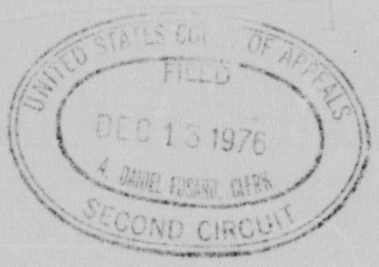
UNITED STATES OF AMERICA,
Appellee

v.

PHILIP RASTELLI, ANTHONY DE STEFANO
and CARL GARY PETROLE,
Appellants

On Appeal From The United States District Court
For The Eastern District Of New York

BRIEF FOR THE UNITED STATES



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ISSUES PRESENTED

1. Whether the evidence is sufficient to sustain the convictions of appellants De Stefano and Petrole for violating the Hobbs Act, 18 U.S.C. 1951.

2. Whether the district court committed reversible error in denying appellant Rastelli's pretrial application for a continuance.

3. Whether questions posed by government counsel on cross-examination of De Stefano, or comments by the prosecutor in closing argument, were prejudicially erroneous.

STATUTE INVOLVED

18 U.S.C. 1951 provides, in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section --
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, appellants were convicted of conspiracy to restrain trade (Count 1); conspiracy to interfere with commerce by extortion (Count 2); and two substantive charges involving interference with commerce by extortion (Counts 5 and 7). Appellant De Stefano was convicted of an additional count charging interference with commerce by extortion (Count 4).[1/] Appellant Rastelli was sentenced to concurrent terms of imprisonment for one year on Count 1 and ten years on the remaining counts, and fined $1,000 on Count 1 and $10,000 on each of the other counts. Appellants Petrole and De Stefano were sentenced to concurrent terms of imprisonment for one year on Count 1 and five

1/ Appellants Rastelli and Petrole were acquitted on Count 4. Counts 3 and 6 were dismissed during the trial, at the government's request.

years on the remaining counts, and fined $1,000 on Count 1 and $5,000 on each of the other counts.

A. The Formation Of The Workman's Mobile Lunch Association.

The mobile lunch truck business consists of individuals who operate trucks specially designed for dispensing food and beverages. The drivers develop routes independently, giving special attention to locations such as factories, where large numbers of workers can be serviced during work breaks. The lunch truck operators[2/] are supplied by their own or separate catering establishments or commissaries, that compete aggressively for customers (E.g., Tr. 532, 568-571, 594-595, 658, 742-744). Lunch truck drivers with established routes frequently encounter competition from other drivers at particularly profitable locations. This competitive practice is known as "bumping." (Tr. 70, 252). Persistent bumping usually results in a price war, with one driver emerging victorious, or in an amicable sharing of the stop (Tr. 431).

In 1965 appellant Petrole and Paul Spector each owned several lunch trucks (Tr. 339-340, 1282). In addition, Petrole, who lived in New Jersey, picked up sandwiches from Pioneer Catering Company, a New Jersey caterer, and delivered them to other lunch truck drivers in New York City and Brooklyn. He was paid a

2/ "Lunch truck" is somewhat of a misnomer; the trucks are sometimes operated by partners in round-the-clock shifts. Drivers travel to industry sites at whatever time a work break is given to employees (Tr. 68-69).

commission of five or six percent of the prices paid for the delivered products (Tr. 569).

In the fall of 1965 Petrole, Spector and two others discussed the formation of an association of mobile lunch truck drivers, indicating that certain benefits could be derived from organizing, such as protecting routes from incidents of bumping, cooperative buying of supplies at discounted prices, and price fixing (Tr. 340-341). Spector did not pursue the matter; however, Petrole continued to explore the possibility of an association. Largely as a result of Petrole's efforts, the Workman's Mobile Lunch Association was formed, and on January 18, 1966 received its State corporate charter. At the time Petrole was named president of the association and Joseph Occhiogrosso served as secretary-treasurer (Tr. 81, Govt. Exh. 4). Thereafter, others joined the association. In 1966 there were 46 members; in later years membership ranged from 34 to as many as 52 (Tr. 975). Each paid an initial membership fee and weekly dues, which started at $3 for each truck operated, and subsequently was raised to as much as $10 (Tr. 75-76, 127-128, 284, 345, 409-410, 914). Although matters such as discount purchasing, group insurance, and discounts on charges for repairing vehicles were discussed at association meetings, in fact drivers never derived such benefits from their membership (Tr. 235), and complaints were not heeded (Tr. 805-806). Appellant Petrole served as president for approximately two years. Upon his resignation, Petrole was awarded an honorary membership,

and paid no dues (Tr. 1298-1303). Elected to replace him were co-defendant Louis Rastelli, nephew of appellant Philip Rastelli. In 1970 appellant De Stefano, a lunch truck driver, was elected to the post of secretary-treasurer (Tr. 1044-1045).

The government's evidence showed that despite his lack of formal relationship with the Workman's Mobile Lunch Association, Philip Rastelli indirectly controlled its membership, and shared in the proceeds from kickbacks forcibly obtained from caterers by association officials, and particularly by Petrole -- even after he had served as president. De Stefano's participation, although commencing after the conspiracy was formed, was crucial to the success of the primary aim of the association -- illegal restraint of trade. In addition, De Stefano also reaped financial benefits arising from the kickback scheme.

B. Incidents Of Trade Restraint Or Attempted Violence.

1. Bumping Incident At Williamsburg Steel Plant

Toward the end of 1965 Edward Sedara, Robert Frank, and Frank Morgan formed a partnership to operate a mobile lunch truck in eight-hour shifts around the clock. They were invited by Petrole to join the Workman's Mobile Lunch Association, then in formation. Petrole explained that the benefits included price discounts, insurance and route protection (Tr. 74-75). The partners agreed to join the association.

After acquiring membership, the partners in early 1966 continued to develop their business, in part by bumping Paul

Spector's trucks at the Williamsburg Steel plant in Brooklyn. At the time Spector was not a member of the association, but Petrole was eager to enroll him because Spector owned a number of trucks (Tr. 79-80). Spector indicated to Petrole that he would join the association if Sedara could be made to cease competing at Williamsburg Steel (Tr. 343-345). Petrole conveyed to Sedara an offer to transfer two or three of Spector's less profitable stops in exchange for Sedara's withdrawal from Williamsburg Steel (Tr. 82-84). When Sedara rejected the proposal, Petrole announced that the matter would be resolved by an unidentified individual whom he called "the boss." (Tr. 84). One evening later that week Sedara, Frank, and Petrole attended a meeting at a dimly lit store in Brooklyn used by Petrole as a commissary. There they met appellant Rastelli, who was introduced by Petrole as "Rusty ... the boss." (Tr. 85-86). Petrole proceeded to explain the problem to appellant Rastelli, after which Rastelli commented that Spector was willing to exchange three stops for an end to the bumping at the Williamsburg Steel location. Sedara responded that he did not trust Spector, and was not about to give up a stop that earned him $60 daily (Tr. 88). Sedara asked what would occur if the three stops received in the deal were not as profitable as Williamsburg Steel. Rastelli replied that in such an event, "Paul Spector has to answer to me." (Tr. 89). Sedara agreed that he and his partners would give further consideration to the matter. However, the partners later decided not to stop

their activity at Williamsburg Steel; as a result they were ousted from the association and warned not to fault the association if anything happened (Tr. 94-95).

Despite the continued competition at Williamsburg Steel, Spector joined the Workman's Mobile Lunch Association. At one meeting of the association Petrole introduced appellant Rastelli to Spector, stating, "This is the head of the association." (Tr. 346-347). Spector decided to engage in "rebumping," i.e., competing with Sedara at locations usually serviced by Sedara's truck. For the next month Spector engaged in this tactic. During this period Rastelli appeared at Spector's commissary each Wednesday to provide encouragement (Tr. 352-354). When Spector appeared to become discouraged Rastelli stated that the matter would be straightened out that coming Friday evening (Tr. 354-355).

During this same time period appellant Petrole and Joseph Occhiogrosso (then officers of the association), driving a lunch truck, began to follow Morgan as he drove the evening shift for the partners (Tr. 216). This led to a fistfight between Petrole and Morgan, while Occhiogrosso stood by holding a wrench (Tr. 216). A week later when Morgan arrived at one of his regular stops he was met by a group of men carrying chains and pipes. They chased Morgan's truck, and caused some damage (Tr. 218-219). After this incident the partners decided to discontinue bumping at Williamsburg Steel because "(W)e were afraid for our health, our lives." (Tr. 230-231). A week later Morgan, Spector and Rastelli met and agreed to work out a compromise (Tr. 357-358). At a subsequent meeting, attended by Spector,

Frank, Sedara, and others, an agreement was reached whereby the partners would no longer service Williamsburg Steel and in exchange, would receive certain locations formerly serviced by Spector (Tr. 125-127, 302, 358-359). In addition, the partners rejoined the association.

2. "Commissions" Obtained By Association Directors.

a. As the Workman's Mobile Lunch Association grew, its focus was directed almost completely at protecting the routes serviced by members from competition, either from non-members or from other association members. New members were enrolled after being promised by Petrole and Rastelli that their routes would be protected (Tr. 769-772).

In 1968 Petrole ceased delivering food to New York for Pioneer Catering, and transferred his sandwich delivery services to a Long Island company, Quick Snack Caterers. Petrole told Spector that appellant Rastelli had "put the squeeze" on the owner of Quick Snack, thereby securing for Petrole a 10% "commission" on all sales to association drivers (Tr. 365, 419). Petrole serviced approximately forty trucks (Tr. 367), receiving the so-called "commission" on the proceeds for foodstuffs he delivered for Quick Snack, and subsequently on behalf of other caterers. In 1969 Alfred Conversi, who owned Canteen Associates, asked Petrole to persuade some of the lunch truck drivers to sell food prepared by Canteen. Petrole agreed to do so, in exchange

for his collecting the proceeds and retaining 10% (Tr. 532-534). The commissions were paid in cash (Tr. 537-538).

b. In 1970 Paul Gellman, whose pastry supply business included twelve association drivers as customers, met with co-defendant Louis Rastelli, who demanded what he termed a "better deal", which translated as a payment to the association by Gellman of three cents per box of cake sold to association members. Louis threatened to transfer the drivers to Quick Snack if Gellman refused the demand (Tr. 596-601). Louis indicated that his uncle, appellant Rastelli, "wanted part of the action." (Tr. 597). Fearing the loss of almost one-third of his business income if the association drivers stopped buying from him, Gellman agreed to the payment, which amounted to about $30 weekly (Tr. 602-603). After nine months, Gellman told Louis that he no longer could afford to make the payments. Louis directed association drivers to refrain from buying Gellman's merchandise. Within one year Gellman lost all twelve association drivers as customers. Most took their business to Spector, who had agreed to pay a five cent per box commission, divided between the association (3 cents) and appellant Rastelli (2 cents) (Tr. 414-415). Spector accepted this arrangement, realizing that he could not otherwise get the drivers as customers (Tr. 415). Six or seven months later, the drivers returned to Gellman when he agreed to resume his three cents per box payments (Tr. 607-609). During this period of time the payments were made primarily to De Stefano or Louis Rastelli and occasionally to Petrole (Tr. 604, 610).

c. In the fall of 1970 Paul Spector formed One Stop Commissary, with Ralph and Augustus Stingo as partners (Tr. 409). They considered purchasing Canteen Associates from Alfred Conversi. Informed by Conversi that he was paying a 10% commission to association representatives, Spector regarded the amount as excessive. At a meeting attended by Spector, the Stingo brothers, Louis Rastelli and appellants De Stefano and Petrole, the existence of the ten percent kickback was affirmed. When offered three percent by Spector, the association officials agreed to discuss the matter with appellant Rastelli. Thereafter, Petrole telephoned Ralph Stingo to report that the offer of three percent was unacceptable. Petrole also noted that he personally received three percent of the present kickback, that appellant Rastelli also received three percent, and that DeStefano and Louis Rastelli were entitled to a share (Tr. 402-405, 465-472). One Stop Commissary did not purchase Canteen, which subsequently ceased doing business (Tr. 408).

d. In 1971 William Bruce, owner of Bruce Vending Company, sought to enter the lunch truck commissary business. When he solicited association drivers individually, Bruce was turned down and told that he would have to consult with Petrole or association leaders (Tr. 663). Within a week Bruce met with Petrole and De Stefano, and thereafter agreed to pay a twelve percent commission for association business (Tr. 665-671). Petrole and De Stefano represented the amount of business available to Bruce at $8,000 or $9,000 weekly (Tr. 667).

In fact, the volume increase for Bruce Vending did not exceed $5,000, and the additional business caused an unanticipated rise in certain of Bruce's expenses (Tr. 678). After a few months Bruce asked Petrole, De Stefano and Louis Rastelli for a reduction in their percentage. De Stefano responded immediately that there would be no change. Petrole and Louis asked De Stefano to leave the room (Tr. 680). They told Bruce that the 12% "had to be spread around." (Tr. 680), and advised Bruce not to raise the matter in the presence of De Stefano (Tr. 681). Petrole said, "(I)f you think I'm getting all this money you have another thing coming. I have to give some to Louis who has to spread it around and I have to give some to Tony (De Stefano) (Tr. 682). At a subsequent meeting a week later Petrole and Louis Rastelli agreed to reduce the kickback to 10% (Tr. 683). Petrole stated that portions of the money were given to De Stefano, appellant Rastelli, Louis Rastelli, and the association treasury (Tr. 689). In December, 1971, Bruce ceased his payments because his deal with the association was not profitable (Tr. 690).

3. Forcible Trade Restraints.

a. During the period of this arrangement with appellants, Bruce had allowed the association to use a back room free of charge (Tr. 678-679). On occasion Bruce overheard discussions regarding route protection, in which Louis Rastelli, De Stefano and Petrole were heard to say, "We will take care of that." (Tr. 697-699). All three would then depart, and on

returning were overheard telling drivers, "Look, we have taken care of that situation and he will never be on your stop again." (Tr. 699). On one occasion Bruce saw De Stefano in possession of a revolver (Tr. 701-702).

b. Among the members of the Workman's Mobile Lunch Association in the fall of 1970 was Matthew Rahle. Initially, he obtained his sandwiches from Kathy's Catering, a caterer that subsequently paid Petrole a commission on sales to association members (Tr. 742-750). Later, Rahle made his purchases from Pioneer, the New Jersey caterer that had ceased its arrangement with Petrole. When Petrole learned of Rahle's switch, he advised Rahle that Pioneer was unacceptable, and that "they were giving me a break letting me buy from Kathy." (Tr. 918, 927). Rahle returned to Kathy's for his supplies.

Thereafter, Rahle experienced competition at one of his regular stops. Rahle referred to a card previously given him by Petrole and Robert Merckling (another association member), containing two telephone numbers to call in the event of bumping. Rahle dialed the number, and spoke with Merckling, who said that he would be there shortly. A few minutes later Petrole and Merckling arrived, each with pistols in their belts. They asked Rahle to explain his problem, after which they headed toward the competing lunch truck. The drivers of that truck immediately entered their vehicle and fled (Tr. 921-922). After telling Rahle that he no longer had to worry about the matter, Rahle and

Merckling drove off in the direction of the just departed lunch truck (Tr. 922).

c. In April, 1972, the Eden Transportation System, a taxicab dispatcher located in Queens, New York, was serviced by several mobile lunch trucks. During that month David Levy, a nonmember of the association, drove his lunch truck to the Eden location to solicit business. Levy arrived shortly before the driver who regularly serviced that stop. After seeing Levy, the regular route driver made a telephone call. Shortly thereafter, a vehicle arrived, containing two men, one of whom was appellant De Stefano (Tr. 873-881). De Stefano told Levy that he was encroaching upon a location regularly served by another driver, and that no other food service vehicle could come there (Tr. 884). Levy refused to leave, claiming that there was ample business for both vehicles. De Stefano advised Levy "to pack up if he knew what was good for him." He placed his hand in a trouser pocket, brushing aside his jacket and revealing a revolver in his belt (Tr. 884-885). De Stefano repeated his admonition to "get the hell out" "if he knew what was good for him." (Tr. 885). At this point an Eden employee intervened, warning both drivers to leave or he would summon the police (Tr. 886). The drivers and De Stefano departed.

C. Statements By Petrole And De Stefano.

On September 15, 1972 FBI agents, after issuing appropriate warnings, interviewed Petrole and De Stefano.

Petrole told an FBI agent that he had formed the Workman's Mobile Lunch Association to reduce route competition, and that initially there were only four members. According to Petrole, he served as an officer of the association for about six mo[illegible] at a salary of $100 per week, and thereafter had curtailed all further activity with the association (Tr. 940). Petrole list[illegible]d the caterers for whom claimed to have worked on a commission basis, mentioning all but Canteen Associates (Tr. 937-938).[3/]

De Stefano stated to an agent that his role as secretary-treasurer include[illegible]esponsibility for mediating disputes among drivers when incidents of bumping occurred. According to De Stefano, he would tell the new competitor that if he did not leave, the association member would undersell him (Tr. 945-948).

Following these interviews, De Stefano had a conversation with William Bruce, in which De Stefano indicated his desire to "make it perfectly clear" to Br[illegible]ce that the commissions were not shared by De Stefano. De Stefano advised that if the FBI asked about the payments, Bruce should reply that the money went to Petrole for commissions due on sandwich deliveries (Tr. 701-702).

3/ Immediately thereafter, Petrole sought to amend his income tax returns to i[illegible]clude the income derived from Canteen (Tr. 1410-1411, 1417-1418).

D. Defense Theories.

Appellant Rastelli did not testify. T theory of his defense was that he was never involved in the Workman's Mobile Lunch Association, and received no kickbacks, or portions thereof, that had been paid to anyone in connection with the association. Moreover, the defense contended that Rastelli might have been confused with his brother, Carmine, who shared the same nickname, Rusty, and was an incorporator of the association (Tr. 1493).

Appellant De Stefano denied receiving kickback monies. He claimed that Gellman's payments were donations made to the association, and recorded in the records (Tr. 1062). De Stefano denied carrying a weapon, telling Bruce how to testify, or preventing nonmembers from competing (Tr. 1065, 1067, 1075-1076). Regarding the incident at Eden Transportation System, De Stefano acknowledged that, as officers of the association, he and Louis Rastelli appeared there to deal with the dispute, but that Louis did the negotiating while De Stefano remained quiet, expressing his objection only when Levy asked whether "the fat guy" (De Stefano) would break his leg if he did not leave (Tr. 1071-1073).[4/]

Appellant Petrole claimed that the association was formed for legitimate purposes, and members were never compelled to join (Tr. 1190-1210). He maintained that Rastelli had no role

4/ De Stefano weighed about 260-270 pounds at the time of the incident, and 480 pounds at the time of trial (Tr. 883, 1041).

in the association, and was only coincidentally present at his commissary store when Sedara and Morgan met to settle the Williamsburg Steel dispute (Tr. 1223-1225). Petrole denied knowing Rahle, or ever possessing a gun in Rahle's presence (Tr. 1220-1221). Finally, Petrole maintained that the payments to him were not kickbacks, but commissions which he lawfully earned (and upon which he payed taxes) for securing business on a voluntary basis for various caterers who had agreed to pay such commissions. Moreover, Petrole denied sharing the commissions with anyone (Tr. 1240-1249, 1252-1259).

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS OF PETROLE AND DE STEFANO ON THE COUNTS CHARGING VIOLATIONS OF THE HOBBS ACT

Appellant Petrole was convicted of three Hobbs Act violations and appellant De Stefano, of four such charges. Contrary to their contentions, the evidence was sufficient as to each of these counts.[5/]

5/ Our discussion omits an analysis of one element of the offense, the effect on interstate commerce, because of appellants' stipulation at trial acknowledging that commerce was affected by the activities of mobile lunch truck drivers (Tr. 579-580), and because appellants do not now challenge the sufficiency of proof of the nexus with interstate commerce.

Moreover, we note that appellants do not attack the sufficiency of their conviction for violating the Sherman Act (Count 1). As to the Hobbs Act counts, appellants received equal concurrent prison terms, but the court imposed cumulative fines.

A. Count 5

Count 5 charged that Petrole, De Stefano and two others (appellant Rastelli, who does not challenge the sufficiency of the evidence on appeal, and Louis Rastelli, who was severed), with depriving Paul Spector and the Stingo Brothers, operating as One Stop Catering, of an economic benefit by threatening that mobile lunch drivers would refrain from dealing with them unless the defendants were paid certain amounts of money. Specifically, this offens dealt with the attempt of the partners of One Stop to purchase Canteen Associates and their decision not to make that transaction because they would have been required to pay a 10% commission to Petrole in order to retain Canteen's business with drivers who were members of the Workman's Mobile Lunch Association (Tr. 1922-1923). In appellants' view, the evidence of guilt was insufficient because the 10% commission arrangement originally came about through the initiative of Conversi, Canteen's owner; because it was a lawful commission arrangement; and because Spector and the Stingo brothers had no economic right "to compel Petrole to yield the fruits of his labors in order to enable them to purchase Canteen Associates on terms they sought to impose." (De Stefano-Petrole Br. 17).

At the outset of our response, we deem it appropriate to observe that, to the extent that appellants' argument is premised upon their version of the facts, it is misplaced. At this juncture, the Court examines the facts in the light most

favorable to the government. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Kahn, 472 F.2d 272, 277 (2nd Cir. 1973), cert. den., 411 U.S. 982. Thus, the contention that Petrole's financial arrangement with Canteen was a legitimate undertaking cannot fairly be argued now, since the jury, properly charged by the district court that the voluntary payment of money unaccompanied by fear of economic loss did not constitute extortion (Tr. 1926), by its verdict has rejected the defense view that no coercion was attached to Petrole's so-called "commission" plan with Canteen. The testimony of Spector relative to his discussion with Petrole on the matter of purchasing Canteen Associates clearly demonstrates that the percentage paid to Petrole was a kickback, given in exchange for the opportunity to draw upon association members as customers. The kickback was paid even though appellants did no work for Canteen (Tr. 405). See United States v. Crowley, 504 F.2d 992 (7th Cir. 1974). Moreover, when Spector offered Petrole three percent of the receipts from his own trucks as well as those served by Canteen, in exchange for "the right to serve them" (i.e., association members) (Tr. 402), with no responsibilities imposed upon Petrole for delivering food or collecting money, Petrole rejected the offer, explaining that "everyone else was paying the ten per cent" (Tr. 404) and that the kickback funds had to be divided among Petrole, appellant Rastelli and Louis Rastelli (Tr. 402, 405). It is also clear from the record that without the

required ten percent kickback, caterers were unable to secure association members as steady customers (E.g., Tr. 407-408).

With the facts in that posture, it can readily be observed that the ability of One Stop to engage in free enterprise without economic coercion by appellants was significantly impaired. United States v. Addonizio, 451 F.2d 49, 73 (3rd Cir. 1971), cert. den., 405 U.S. 936. This lost business opportunity, arising from the refusal to make payments that threatened the very economic survival of the company, was an adequate basis for a Hobbs Act conviction. United States v. Hathaway, 534 F.2d 386, 396 (1st Cir. 1976), cert. den., ___U.S. ___ (October 4, 1976, No. 75-1529). No explicit threat was necessary. United States v. Hyde, 448 F.2d 815, 845 (5th Cir. 1971), cert. den., 404 U.S. 1058.[6/] Accordingly, the evidence of guilt was ample.

At trial and on appeal the government has relied in part upon United States v. Addonizio, supra, involving a scheme whereby bidders on municipal projects were not awarded the jobs unless they had agreed to pay certain city officials and their cohorts 10% of the contract price. The Third Circuit ruled that the defendants' conduct constituted extortion within the meaning

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6/ Alternatively, assuming that the "commission" arrangement between Petrole and Canteen was lawful, Petrole had no lawful right to require continuation of the arrangement by One Stop, if it purchased the Canteen operations, leaving One Stop no option to solicit association business for itself without Petrole's middleman services. The absence of a choice to compete freely as a practical matter, constituted economic coercion, and caused economic harm, resulting in the decision of One Stop that it would not take over the Canteen operation.

of 18 U.S.C. 1951 even though victims had foreknowledge that a kickback would be required. Moreover, the Court of Appeals ruled that under the Hobbs Act the rights interfered with need not be simply contractual in nature. Addonizio, supra, 451 F.2d at 72-73. The convictions in Addonizio did not rest solely upon the fact that public officials had deprived bidders of a right guaranteed by a city ordinance to be awarded a public contract if they were the lowest bidders. Accordingly, appellants' attempt to distinguish Addonizio (Petrole-De Stefano Br. 18-19) is not well taken. On the contrary, the right of a private businessman to pursue a lawful business is itself a valued property right protected by the Hobbs Act whether or not additional guarantees are made by local laws. See United States v. Tropiano, 418 F.2d 1069, 1076 (2nd Cir. 1969), cert. den. sub nom., Grosso v. United States, 397 U.S. 1021; United States v. Glasser, 443 F.2d 994, 1007 (2nd Cir. 1971), cert. den., 404 U.S. 854.

B. Count 7

This count related to the unprofitable efforts of William Bruce and his enterprise, Bruce Vending Company, to enter the mobile lunch truck commissary business. According to Bruce, when he first sought to solicit business from drivers at a loading area a block away from his office, he was told unequivocally by drivers who belonged to the association that Petrole had to be consulted (Tr. 663-664). Only after negotiating with Petrole and De Stefano and agreeing to pay a 12% kickback did Bruce

acquire association drivers as customers. When Bruce fell behind in his payments he was threatened with the loss of the business from association drivers (Tr. 694). Indeed, during the time that he paid the kickback, Bruce was able to serve as a supplier for association drivers; but when the kickbacks were discontinued, the business from association drivers came to a halt. Asked why he had paid the kickback, Bruce replied, "I believed that I was paying to get the business. If I didn't pay it I wouldn't get the business. They told me that." (Tr. 691).

In their attack upon the evidence supporting the conviction on count 7, appellants note that Bruce had voluntarily agreed to pay what they term a "commission," after seeking out Petrole and for the purpose of making a profit. Moreover, appellants dispute the contention that they controlled the drivers, and cite as examples the fact that before agreeing to deal with Bruce, Petrole did not implement his arrangement automatically, but deemed it necessary to test out the sandwiches offered by Bruce, and the fact that the drivers rebelled at an attempt by Bruce to raise wholesale prices, and could not be restrained by appellants (Petrole-DeStefano Br. 19-20). Appellants' arguments are not substantial.

The coverage of the Hobbs Act is extensive; it prohibits the obtaining of property by exploiting a reasonable fear of economic harm, whether the victim or the offender made the first move toward the conduct that developed into an extortionate demand. See United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. den., 417 U.S. 968. Moreover, the operation of the

statute is not affected by the atmosphere of cordiality that might have existed between the victim and the extorters. United States v. Crowley, 504 F.2d 992, 996 (7th Cir. 1974); United States v. Hyde, 448 F.2d 815, 834 (5th Cir. 1971), cert. den., 404 U.S. 1058. As stated by the Seventh Circuit in United States v. De Met, 486 F.2d 816, 820 (7th Cir. 1973), cert. den., 416 U.S. 969, "Fear may be present even if confrontations between the victim and the alleged extorter appear friendly." This is particularly so in situations where the victim is at the economic mercy of the extorters, and has to keep them satisfied. Ibid.

In the instant matter Bruce had only one avenue open to him if he was to realize his hope of expanding his operations. Bruce was compelled to negotiate with Petrole, and remained on cordial terms -- even to the extent of providing office space rent-free -- in order to secure what he expected to be a profitable arrangement. The vice lay not in the victim's profit motive, but in the extortion of kickbacks that reduced or eliminated potential profits, and the presence of well-grounded fear of economic loss upon noncompliance with the demands of the extorters.

Insofar as Petrole and De Stefano dispute the proof that they in fact controlled the drivers to the extent of directing them to make purchases of supplies at certain approved locations, we point out that (1) there was ample proof in the record that appellants and Louis Rastelli weilded that power;

(2) the issue is not whether they in fact possessed such control, but whether the victim had a reasonable belief that they had the power to tell the drivers where their purchases should be made, and whether this belief was exploited, see United States v. Hall, 536 F.2d 313, 320 (10th Cir. 1976), cert. den., ___U.S. ___ (November 1, 1976, No. 76-11); and (3) the matter presented a question of fact for the jury (which, by its verdict, resolved the issue against appellants[7/]) and not a question of law for this Court to examine. The evidence supporting the convictions on Count 7 was sufficient.

7/ The fact that the evidence referred to by appellants as tending to show an absence of control over the drivers was adduced by the government is irrelevant. The jury was not required to accept or reject the government witness in toto, and may well have discounted the impact of the proof which appellants refer to as tending to contradict the proof of their control. Furthermore, that testimony is subject to other explanations consistent with the government's position. The fact that Petrole wanted to test the quality of Bruce's products before instructing his drivers to purchase them for resale could demonstrate Petrole's business acumen, showing that he did not desire to create any lasting kickback relationship with Bruce if the sandwiches were inadequate and the likelihood of monetary gain was dim. The decision by Bruce to raise prices was made unilaterally. On hearing of the increase the drivers did not voice their objections to Bruce, but rather to Petrole and De Stefano. There was no showing that they broke ranks or that appellants strongly supported Bruce in his endeavor to lift prices. The raises were immediately rescinded before any loss of business occurred. Manifestly, this episode is not subject solely to the interpretation that appellants did not control the drivers.

C. Count 4

Only appellant De Stefano was convicted by the jury of violating count 4, dealing with the incident with David Levy at Eden Transportation Company. Once again, the argument in favor of reversal places reliance upon facts and testimony favorable to appellants (Petrole-De Stefano Br. 6-8); to the extent that this is the case, it is unnecessary to reply beyond invoking the Glasser rule, supra.

In attacking the sufficiency of proof even in the light most favorable to the government, appellants contend that the absence of trial testimony from Levy,[8] the victim of De Stefano's threats, created a fatal gap in the proof of his subjective fear. This argument ignores the fact that the indictment charged De Stefano with an attempt to induce his victim to part with property by extortion, as well as the completed violation of 18 U.S.C. 1951. The court charged that the offense was complete if the jury believed that De Stefano attempted to induce the victim to part with property, and did so by knowingly and wilfully attempting to commit or actually committing extortion, thereby interrupting commerce (Tr. 1920-1922). Given those instructions, the jury need not have concerned itself with the sufficiency of proof that David Levy experienced fear as defined in the statute. Proof that De Stefano attempted to instill that fear, and took positive steps in pursuit of that goal, was sufficient to convict him of the offense. See United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. den., 419 U.S. 1114. That standard of

8/ As appellants note, Levy was confined in a mental institution at the time of trial, for reasons unrelated to this case.

proof was satisfied by evidence that De Stefano, weighing more than 260 pounds, accosted Levy, who was about 5' 2" tall; that De Stefano told Levy to "pack up if he knew what was good for him," (Tr. 884), and that De Stefano made a physical motion that enabled him to expose for public view a weapon that he had tucked in his trouser belt.

In any event, that very same evidence, coupled with testimony from eyewitness Tillman that he was situated directly alongside Levy's vehicle, only three or four feet away from Levy and De Stefano (Tr. 906), was sufficient to enable the jury to infer that De Stefano's conduct had its desired effect upon Levy's state of mind, and that De Stefano's gesture, which bared his revolver, was not lost upon the intended victim. Certainly it would have been desirable to have first-hand testimony from Levy; his absence, however, did not prevent the government from proving by circumstantial evidence what it could not establish by direct evidence. See United States v. Hyde, 448 F.2d 815, 845 (5th Cir. 1971), cert. den., 404 U.S. 1058.[9/] The jury's satisfaction with the proof does not give rise to any basis for reversing the conviction of count 4.

9/ Lest appellants' contention on appeal be construed as attacking the hearsay nature of any relevant testimony on this issue, we point out that evidence tending to prove state of mind is an exception to the rule against hearsay evidence; that defense counsel at trial lodged no objections premised upon admission of hearsay testimony; and that hearsay evidence, if not objected to, is entitled to its natural probative value. See United States v. Costello, 221 F.2d 668, 677-678 (2nd Cir. 1955), aff'd., 350 U.S. 359 (1956).

D. Count 2

Count 2 alleges a conspiracy to obstruct commerce by extortion, giving three examples of that unlawful conduct: the Sedara-Frank-Morgan episode in 1966, leading to their decision to forego competing at the Williamsburg Steel plant, the incident involving David Levy at Eden Transportation, and the numerous attempts to obtain kickbacks from various lunch truck suppliers, including One Stop Catering, Bruce Vending, Paul Gellman and Kathy's Caterers. Contrary to appellants' contention, the pertinent evidence, set forth in the Statement portion of this brief, amply justifies the jury's verdict on this count. Appellants' argument against sufficiency has as its foundation the notion -- rejected by the jury -- that the payments made by these business people were voluntary and that no threats were made by appellants (Petrole-De Stefano Br. 28-29). The government's proof established a pattern of joint misconduct in which appellants were at the forefront, causing caterers who were engaged in a highly competitive business and who obviously coveted the potential profits to be realized by servicing the large number of mobile lunch trucks under appellants' control, to pay either "commissions" or "donations" to appellants as a precondition to obtaining access to the drivers. The importance of making the required payments is underscored in the testimony of Paul Gellman, showing a complete loss of the association business when he ceased paying kickbacks, and a resumption of this business only after he agreed once again to pay the three-cents per-box of

cake tribute exacted by appellants. The government adequately proved that the caterers feared - and in fact experienced -- financial losses if they did not pay, and moreover, that the kickbacks were not voluntary payments made for services actually performed. That proof satisfied the statutory definition of extortion, without the need for showing physical threats. United States v. Hathaway, supra; United States v. Crowley, 504 F.2d 992 (7th Cir. 1974); United States v. De Met, supra; United States v. Jacobs, 451 F.2d 530 (5th Cir. 1971), cert. den., 405 U.S. 955. There was ample proof of a sharing by appellants of the control of the drivers and of the kickback proceeds, thereby permitting the jury to find the existence of a conspiracy.

II

THE DENIAL OF APPELLANT RASTELLI'S PRETRIAL MOTION FOR A CONTINUANCE WAS NOT AN ABUSE OF DISCRETION

1. The facts pertinent to this issue may be found in transcripts of pretrial hearings dated March 29 and March 30, 1976, as well as this Court's opinion in Rastelli v. Platt, 534 F.2d 1011 (2nd Cir. 197). Appellants and their co-defendants were indicted on March 5, 1975. All but De Stefano were arraigned during that month, and the first trial date, April 4, 1975, was set. On April 2, 1975, an adjournment was requested by appellant Rastelli because he had been hospitalized. In May De Stefano was arraigned, and the case was assigned a trial date of September 5, 1975. On

that date a further adjournment for two months was granted at Rastelli's request. Further delays in the trial date were secured by appellants, and on December 29, appellant Rastelli requested a hearing on whether he was physically able to stand trial.

On January 2, 1976, an adjournment was granted to allow time for medical examinations. At that time defendants and their counsel agreed that they would be ready for trial on March 29, 1976. However, ten days before the trial date, the court summoned defense counsel to discuss rumors that they would be seeking yet another postponement. At that meeting the court was advised that Mr. Sutter, who had represented appellant Rastelli from the outset, would be replaced (March 29 Tr. 9-12).

In fact three weeks earlier Mr. Sutter had agreed to represent an accused in a State court trial whose schedule conflicted with the date set for Rastelli's trial. That assignment was accepted without notifying the district judge (March 30 Tr. 34). On March 15, 1976, appellant Rastelli retained new counsel, the firm of Saxe, Bacon, and Bolan. However, no formal substitution was made with the clerk of the district court. Nevertheless, new counsel on March 19 and again on March 24, 1976, requested continuances of one week. The district court denied the requests, following which Rastelli petitioned this Court for a writ of mandamus to order a stay of the trial. This Court ruled that it had

no jurisdiction to rule on the petition, because the subject matter of the appeal was an interlocutory order. Rastelli v. Platt, 534 F.2d 1011 (2nd Cir. 1976). The Court suggested, however, that the trial judge might wish to reconsider his denial in light of the equities and the reasonableness of the length of the continuance requested.

The district court accepted this Court's suggestion, and ordered that the case be postponed for a week. During the week of March 29, the court held hearings on the matter of the conduct of Rastelli's former counsel. On Monday, March 29, Rastelli's eventual trial counsel, Mr. Lang, indicated his willingness to accept a schedule that included selection of the jury on the forthcoming Thursday, with the taking of testimony delayed until the following Monday (March 29 Tr. 21). On the next day Mr. Lang repeated his willingness to proceed with the selection of the jury on Thursday (March 30 Tr. 21-22). Mr. Lang explained (March 30 Tr. 23):

> ...I will tell you what adequate (preparation time would be--it would be a month in a type of case like this. We asked for a week and we said we would come in with the week. We will go ahead with the trial as Your Honor has suggested, and further than that, I am not complaining about it.

Mr. Lang added that he could not be certain that the time for preparation would be adequate; nevertheless, he had made the

decision on behalf of his law firm to be prepared to begin on Thursday (March 30 Tr. 23-24). In reality, the trial began not on Thursday, but on the succeeding Monday, April 5, 1976. The first major witness was not cross-examined by Mr. Lang until the following day. At no time thereafter did Mr. Lang profess an inability to proceed, either with cross-examination or with his own case, on the ground that he was unprepared because of inadequate time for preparation.

2. In claiming that the denial of a continuance was reversible error, appellant Rastelli rightly recognizes that the matter was addressed to the sound discretion of the trial judge, and that in order to prevail in his claim on appeal, he had the burden of demonstrating that the court's conduct was arbitrary, and served to impair the defense (Rastelli Br., pp. 9-10). Although we agree with Rastelli's statement of the prevailing standard for review, see Ungar v. Sarafite, 376 U.S. 575 (1964); United States v. Maxey, 498 F.2d 474 (2nd Cir. 1974); United States v. Keilly, 445 F.2d 1285 (2nd Cir. 1971), cert. den., 406 U.S. 962; United States v. Ellenbogen, 365 F.2d 982 (2nd Cir. 1966), cert. den., 386 U.S. 923; see also United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976), we do not subscribe to Rastelli's assertion that he has demonstrated the existence of prejudicial error arising from the district court's handling of this matter.

The court's initial refusal to delay the start of trial beyond March 29 was made only after a thorough analysis of the history of these proceedings, containing numerous pretrial delays already secured on behalf of Rastelli. Nevertheless, when, in March 1976, this Court was asked by Rastelli to stay proceedings, responding with a ruling that it lacked jurisdiction and with a suggestion that a short delay would be salutary, the district court permitted a continuance of one week. That duration was in excess of the few days requested by newly retained counsel for Rastelli. Thus, in reality counsel received more time to prepare for trial than he had expressly indicated to be necessary.

Moreover, counsel can point to nothing in the lengthy trial that demonstrates that Rastelli's defense strategy was impaired because of his attorney's lack of preparedness. Rastelli's strategy in essence was a passive one: counsel sought to demonstrate Rastelli's non-involvement with the Workman's Mobile Lunch Association, and with the kickbacks admittedly received by Petrole. His cross-examination was designed to elicit testimony that victims did not know Rastelli, had not given Rastelli any money, or had seen him only on rare occasions in any activity related to the association.

Counsel on appeal contends that Rastelli's defense was handicapped by unpreparedness, but fails to set forth any specific instances of impairment, or any course that might have been taken but was not because of a lack of time (Rastelli Br. 16-17) 16-17). In light of the adequacy of the defense actually provided, the skill of trial defense counsel (as clearly demonstrated in the record) and the absence of any particularized showing of impairment, coupled with the trend of events that unfolded after the initial denial of a continuance in mid-March, 1976, the claim of reversible error premised upon that denial is meritless. United States v. Uptain, supra, 531 F.2d at 1286-1287; United States v. Maxey, supra, 498 F.2d at 483-484.

III

NEITHER THE QUESTIONS POSED BY THE PROSECUTORS ON CROSS-EXAMINATION NOR THE CLOSING ARGUMENT OF GOVERNMENT COUNSEL CONSTITUTED REVERSIBLE ERROR

In addressing this issue presented by appellants, we begin by observing that they are complaining of isolated statements or questions recited in a lengthy trial. During the multi-week trial the prosecution introduced evidence concerning a number of transactions, using competent evidence and abundant testimony that is beyond challenge. In light of this, the admonitions of Justice Frankfurter not to magnify the adverse impact of any particular incident or to extract from isolation

abstract questions of evidence or procedure, thereby turning the criminal appeal into a quest for error, are pertinent benchmarks. Glasser v. United States, 315 U.S. 60, 88 (1942); Johnson v. United States, 318 U.S. 189, 202 (1943). With these principles in mind, we turn to the allegations of error generated by prosecutorial conduct. In our view, the incidents complained of were not reversible error.

a. The direct testimony and cross-examination of appellant De Stefano lasted almost an entire day. Out of seventy-six pages of cross-examination, appellants refer to two instances where questions were posed that they deem improper. In both illustrations the questioning dealt with differences between De Stefano's account of certain events and the description of the same incident by government witnesses Bruce and Tillman. In the first instance government counsel asked De Stefano whether Bruce was telling the truth, and the following ensued (Tr. 1097-1098):

> Q: Was he telling the truth?
>
> A: No, he wasn't.
>
> Q: Do you know any reason why he would like (sic) on the witness stand?
>
> MR. SONENSHINE (Defense Counsel): Objection. He is asking him to testify to the state of mind of another witness.
>
> THE COURT: I will allow it.
>
> Q: Do you know why Mr. Bruce would come in here and perjure himself?

A: I don't ink the man ever took a liking t me because I was just too much for my men.

Later, De Stefano told government counsel that he did not have a gun when he investigated the bumping incident at Eden Transportation (Tr. 1125):

Q: Did you have a gun in your belt?

A: No.

Q: Did you hear Mr. Tillman testify to that?

A: Yes.

Q: Had you ever met Mr. Tillman before today to your knowledge?

A: No.

Q: Does he have any reason to lie?

A: I don't think so.

MR. SONENSHINE: I object to it.

THE COURT: If he knows a reason.

A: No, I don't know if he has a reason to lie.

Citing no authority, appellants find fault with the questions, claiming that they allowed the prosecutor to "demand" that De Stefano supply a motive for the testimony given by government witnesses, and thereby shifted the burden of proof (Petrole-De Stefano Br. 34-35). On the contrary, the questions sought to develop the relationship between De Ste no and the government witnesses, and was admissible on the matter of bias consistent with the principle that the jury, in assessing

credibility, could consider, inter alia, "any relation each witness may bear to either side of the case." (Tr. 1936). The prosecutor was not inquiring indirectly into the state of mind of other witnesses through the testimony of De Stefano; rather, he sought to adduce whatever knowledge De Stefano possessed that would give rise to a reason for the jury to discredit the government witnesses. The questions, addressed to the issue of bias, bore some risk because De Stefano may well have responded by revealing that the government witnesses had a motive to give false or misleading testimony. See United States v. Lester, 248 F.2d 329 (2nd Cir. 1957). Admissibility was unaffected by a response that the witness had no knowledge of facts albeit perhaps a suspicion that would give rise to the jury believing that witnesses adverse to him were biased. Any implications that defense counsel believed to have arisen from the cross-examination could have been dealt with on redirect examination.

In the final analysis, however, we deal with a trial practice whose scope is left to the wide discretion of the court. The decision permitting or denying a proposed question on cross-examination is not overruled on appeal absent a showing a prejudice. United States v. Blackwood, 456 F.2d 526, 529 (2nd Cir. 1972), cert. den., 409 U.S. 863. There was no such showing here, particularly since the questions objected to were in fact proper. As stated by the Supreme Court, Alford v. United States, 282 U.S. 687, 694 (1931):

> The extent of cross-examination with respect to an appropriate subject of

> inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted ... But no obligation is imposed upon the court ... to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him ... But no such case is presented here.

b. The comments of government counsel attacked on appeal concern their characterization of some government witnesses as being reluctant ("It was like pulling teeth out of them." (Tr. 1831)) and their suggestion that overt threats were not made to extortion victims because they were unnecessary as long as Petrole had "the power of Philip Rastelli behind him." (Tr. 1832), since "behind that velvet word there was a velvet hammer." (Tr. 1844). In addition, appellants claim that the prosecutor should not have suggested that the jury could infer from the record that Petrole had not reported in his tax returns the total extent of the revenue received from Quick Snack (Petrole-De Stefano Br. 36-40; Rastelli Br. 21-24). These comments did not taint appellants' convictions.

We recognize that courts have long been concerned with the propriety of a prosecutor's closing argument, and do not hesitate to reverse convictions where the argument mistates facts, or contains undignified, intemperate or misleading insinuations.

Berger v. United States, 295 U.S. 78, 84-89 (1935). Conversely, "(T)he time has not yet come when a prosecuting attorney cannot argue the strength of his case -- the weight and sufficiency of the evidence -- and ask th ,ury for a conviction." United States v. Wayman, 510 F.2d 1020, 1028 (5th Cir. 1975), cert. den., 423 U.S. 846. As this Court stated recently (United States v. Wilner, 523 F.2d 68, 74 (2nd Cir. 1975):

> A prosecuting attorney is not an automaton whose role on summation is limited to parrotting facts already before the jury. He is an advocate who is expected to prosecute diligently and vigorously, albeit without appeal to prejudice or passion. His task is not rendered easy the the 'no holds barred' tactics indulged in by all too many defense counsel in recent years.

In this case the prosecutor's remarks fell well within the bounds of permissible advocacy. The comments did not reflect a personal belief of guilt based upon extrinsic evidence,[10/] nor did they seek to suggest to the jury that transgressions not proven in the courtroom should be weighed is assessing guilt.

Rastelli's role was not "unfairly characterized ..." United States v. Gudice, 425 F.2d 886 (2nd Cir. 1970), cert. den. sub nom. Fontana v. United States, 400 U.S. 842. Referring to his possession of unusual "power" was a "fair comment on what

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10/ In United States v. Torres, 503 F.2d 1120, 1127 (2nd Cir. 1974), this Court observed that the "I submit" form of argument (which government counsel employed here) did not constitute impermissible personel vouching for the credibility of a witness.

the jury might draw from the evidence," United States v. Grant, 462 F.2d 28 (2nd Cir. 1972), cert. den., 409 U.S. 914, to explain how this individual, often called "the boss" or "the old man" (e.g., Tr. 86, 404, 469) despite his lack of official status or even membership in the association, could exert final authority on essential matters of association concern. Other comments challenged by the defense were similarly within the "broad limits" accorded a prosecutor to argue inferences which he desired the jury to draw from the evidence. United States v. Gerry, 515 F.2d 130, 144 (2nd Cir. 1975), cert. den., 423 U.S. 832; United States v. White, 486 F.2d 204 (2nd Cir. 1973), cert. den., 415 U.S. 980.

Moreover, if any impropriety might have arisen from the prosecutor's remarks, it did not amount to prejudicial error. This was not a short trial, where the comments in closing argument generally are regarded as having a more severe impact upon the jury than in lengthy proceedings. United States v. White, supra, 486 F.2d 204, 206. The prosecution's evidence was abundant, clear and convincing. Before closing argument commenced, the district judge admonished the jury to bear in mind that the statements of counsel were not evidence, and that the jury's own recollection of the testimony and exhibits, rather than counsels', controlled during deliberations (Tr. 1681-1682). A second such admonition was given after closing argument (Tr. 1930-1931). The jury's extended deliberations and its numerous requests for supplementary instructions were clear indications that it was not

unduly influenced by non-evidentiary matters. Its verdict, which included an acquittal of Rastelli on one of the counts charged in the indictment, also demonstrated that it was unaffected by whatever excessive or intemperate rhetoric might have come from counsel. Accordingly, the claims related to the closing argument of counsel do not warrant reversing appellants' convictions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the convictions should be affirmed.

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CERTIFICATE OF SERVICE

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